85-638

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No.

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LOWENE R. CLEMENTE,

Petitioner,

vs.

UNITED STATES OF AMERICA; UNITED STATES AIR FORCE, a military department of the United States of America, with VERNE ORR, Secretary; RONALD J. BISHOP, JR.; HAROLD L. PRAY; CHARLES L. BROWER; PHILLIP G. SENESCHAL; HARRY W. JOHNSTONE; and JEFFREY W. COOK,

Respondents.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether federal civil service employees possess "property" interests in their positions or "liberty" interests in their careers protected by the Fifth Amendment of the Constitution, so as to allow the recovery of damages against individual federal officials who deliberately refuse to afford administrative processing in accordance with agency regulations and orders of a District Court.

2. Whether all victims of constitutional violations by governmental entities should be afforded like damage remedies irrespective of the common law doctrine of federal sovereign immunity, rather than the disparate remedies now afforded dependent upon whether the perpetrating governmental entity is a federal agency or a lesser governmental organization under Owen v. City of Independence, Missouri, 445 U.S. 622 (1980).

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## OPINIONS BELOW [1]

The United States Court of Appeals for the Ninth Circuit has issued an opinion in this case, which has been reported at 766 F.2d 1358. A copy of this opinion appears in Appendix A to this Petition at pages 1-37.

The United States District Court for the Central District of California has issued a decision in this case, which has been reported at 568 F.Supp. 1150 (1983). A copy of this decision appears in Appendix B to this Petition at pages 38-137.

The judgment of the United States District Court for the Central District of California, from which this second appeal to the United States Court of Appeals for the Ninth Circuit was taken, was entered on

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1/ The caption of the case in this Court contains the names of all parties. Rule 21.1(b), Rules of the Supreme Court of the United States.

August 12, 1983. A copy of this judgment appears in Appendix B to this Petition at pages 138-144.

Previous to its recent opinion, the United States Court of Appeals for the Ninth Circuit, on a previous appeal by the United States in this case, issued an unreported memorandum on December 14, 1981. A copy of this memorandum appears in Appendix B to this Petition at pages 145-150.

This previous appeal of the United States was from a judgment of the United States District Court for the Central District of California, entered April 30, 1980. Copies of the Decision and Order Remanding Case and for Dismissal Without Prejudice, reported at 488 F.Supp. 854, and the unreported Judgment Remanding Proceeding For Administrative Processing, And Dismissing Complaint Without Prejudice

To Reopening Or To Filing Of New Complaint, both entered April 30, 1980, appear in Appendix B to this Petition at pages 151-159 and 160-164, respectively.

Said initial judgment and decision of the United States District Court for the Central District of California, entered April 30, 1980, were the result of a Notice of Reduction In Force -- Job Offer of the Department of the Air Force, Vandenberg Air Force Base, California, issued on May 12, 1977. A copy of this Notice appears in Appendix B to this Petition at pages 165-169.

The second judgment and decision of the United States District Court for the Central District of California, entered August 12, 1983 were the results of a Notice of Final Air Force Decision of the Department of the Air Force, Vandenberg Air Force Base, California, issued November 19,

1980. A copy of this Notice appears in Appendix B to this Petition at pages 170-174.

The judgment of the United States Court of Appeals for the Ninth Circuit to which this Petition is lodged, was entered on July 24, 1985. A copy of the Judgment appears in Appendix C to this Petition at pages 175-176.

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 24, 1985. The jurisdiction of this Court is invoked under 28 USC sections 1254(1) and 2101(c).

## CONSTITUTIONAL, STATUTORY AND ADMINISTRATIVE PROVISIONS

This case involves a comparison of the remedies available under the Fifth Amendment of the Constitution of the United

States and 42 USC section 1983 within the federal civil service system of the United States Air Force.

The Fifth Amendment of the Constitution of the United States provides, in part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

42 USC section 1983 provides, in part:

> "Every person, who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any

rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Civil service processing of complaints, grievances and complaints within the United States Air Force at the time of this case was governed by Air Force Regulation 40-713, dated October 20, 1975, a portion of which regulation provided:

"If the complainant elects to proceed under FPM Chapter 713, after having been specifically informed of his right to use the other appellate system, then the entire matter, including the merits of the action will be reviewed under this regulation."

A copy of Paragraph 33 of Air Force Regulation 40-713, dated October 20, 1975, appears in Appendix D to this Petition at pages 177-179.

## STATEMENT OF CASE

The principle espoused in Owen v. City of Independence, Missouri, 445 U.S. 622 (1980) that:

> "How 'uniquely amiss' it would be, therefore, if the government itself -- 'the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct' -- be permitted to disavow liability for the injury it has begotten . . . . " Id. 445 U.S. at 651,

lies at the forefront of this case, which has resolved itself into a plea for fundamental due process in the federal civil

service system.

In 1977, Lowene R. Clemente, a career civil servant at Vandenberg Air Force Base, California, was the subject of a one-person Reduction-In-Force (herein "RIF"). Upon notification, she immediately appealed and subsequently requested a hearing on her four complaints; but still today, after eight years of complex court proceedings, two appeals, and nineteen days of trial, the United States Air Force and its officials have obstinately refused such a hearing, even though the United States District Court ordered "continuous and diligent administrative processing" of all of the "complaints of Plaintiff" and warned that the failure to accomplish administrative processing "constitute(s) arbitrary, capricious, and unreasonable denial of due process of law rights of Plaintiff."

At trial, the United States District Court was faced with the continual, obstinate refusal of the United States Air Force and its officials to accomplish administrative processing and thus fashioned a Bivens [2] damages remedy against the United States, the United States Air Force and its responsible officials. The United States Court of Appeals for the Ninth Circuit reversed the judgment against the United States and the United States Air Force finding that they were bound by precedent upholding the common law doctrine of sovereign immunity [3]. The Ninth Circuit also reversed

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2/ Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971)

3/ The United States Court of Appeal for the Ninth Circuit noted that there was "considerable appeal to the proposition that a remedy for a constitutional violation ought not to be defeated by the common law doctrine of sovereign immunity"

the judgment against the individual officials finding that Lowene Clemente did not have a property and/or liberty interest in her federal civil service position or career subject to protection under the Fifth Amendment.

A. BACKGROUND OF PETITIONER CLEMENTE.

Petitioner, Lowene Clemente, is and was a General Schedule, civil service employee stationed at Vandenberg Air Force Base, California, with 22 years of federal service at the time of trial. She was experienced in the computer and data automation fields, was close to completing a Masters' Degree, had never been the subject of any disciplinary action, and had above-average performance reports.

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but determined that they were bound by precedent, which has not been recently reexamined.

Mrs. Clemente began her civil service career as a GS-3 Card Punch Operator and consistently rose in her position until she was promoted to a GS-07 EAM Project Planner with the 6596th Instrumentation Squadron at Vandenberg Air Force Base (herein "Vandenberg"). She remained in that position until May 17, 1977 when through a one-person RIF, she was immediately and temporarily transferred to the Base Legal Office to occupy a GS-5 position. Again, on July 17, 1977, she was reassigned to a GS-6 Computer Operator position in Base Supply. 4/ Upon notification of the RIF (Appendix B, page 165), Mrs. Clemente filed a combined RIF appeal

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4/ Although Vandenberg is an expanding installation and Mrs. Clemente has RIF priority referral and selection rights, she still remains at a GS-06 position, as she has been the target of disdain by management. Reduction In Force: A Guide for the Uninitiated, 44 George Washington Law Review 642 (1976).

and discrimination complaint with the Federal Employee Appeals Authority ("FEAA").

A RIF appeal and discrimination complaint each had, and now has, its own separate and distinct system for administrative review. 5 CFR Part 351; 5 CFR Part 713; AFR 40-351; AFR 40-713. The administrative processing of a combined or mixed case (one involving multiple claims) can be accomplished through either one of these systems -- either as a Part 351 RIF appeal with a discrimination complaint attached or a Part 713 discrimination complaint with a RIF appeal attached. 5 CFR 713.236; 5 CFR 772.306. Specifically, paragraph 33, Air Force Regulation ("AFR") 40-713 provides:

> "(2) If the complainant elects to proceed under FPM chapter 713 after having been specifically informed of his right to use the other appellate system, <u>then the</u>

entire matter, including the merits of the action, will be reviewed under this regulation." (Emphasis added; see Appendix D, page 177)

B. FOUR CLAIMS OF PETITIONER CLEMENTE.

Recognizing Mrs. Clemente's mixed appeal, the FEAA referred it to Vandenberg's Civilian Personnel Officer ("CPO") for an election in processing between Parts 351 and 713 of the Federal Personnel Manual. An election was never gained; the FEAA cancelled the processing of the claims under Part 351; and Mrs. Clemente subsequently requested processing under Air Force Regulation 40-713 and Part 713 of the Federal Personnel Manual. 5/ EEO Counsel-

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5/ Mrs. Clemente was entitled to file a complaint in a United States District Court

ing is required under 713 processing; and in the course of said informal counseling, claims of retaliation, reprisal, and violation of priority referral and selection rights surfaced. A formal complaint was subsequently lodged with the Air Force; and after waiting 180 days without notification by the Air Force (42 USC section 2000e-16(c)), Mrs. Clemente filed her initial complaint in the United States District Court asserting four claims --

1. RIF action was improper, not in good faith, for personal reasons, and was really a disciplinary measure. (Ftn. 16, Nixon v. Fitzgerald, 457 U.S. 731 (1982); Horne v. Merit Systems Protection Board, 684 F.2d. 155 (1982); Fitzgerald v.

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through Part 713 processing. Thus, the jurisdiction of the United States District Court herein was based upon 42 U.S.C. 2000e-16(c) and 28 U.S.C. 131.

Hampton, 467 F.2d 755 (D.C. Cir. 1972).

2. RIF action was discriminatory, as petitioner asserted that her black supervisors instituted the RIF because of her caucasian race.

3. Denial of priority selection and priority referral rights.

4. Retaliation and reprisal because of the filing of the initial claims.

C. INITIAL U.S. DISTRICT COURT PROCEEDINGS.

After answering Mrs. Clemente's initial complaint, the Air Force moved to dismiss the complaint for lack of subject matter jurisdiction. On April 30, 1980, the District Court, however, determined that it had jurisdiction, Cooper v. Bell, 628 F.2d 1208 (9th Cir. 1980), and found that because of "failures by defendants,

plaintiff's complaints were never accepted or processed administratively in accordance with defendant's regulations, which processing would aid immensely in the resolution of the difficulties herein considered, which failure constituted and constitute arbitrary, capricious and unreasonable denial of due process of law rights of plaintiff." (Emphasis added, Appendix B, page 153.) Thus, "the complaints of plaintiff as presented herein (initial U.S. District Court Complaint) (were) . . . remanded to the Civilian Personnel Office . . . for continuous and diligent administrative processing . . . to be initiated within sixty (60) days . . . ." (Emphasis added, Appendix B, page 155.)

The court admonished the Air Force that "[s]aid processing should be accomplished in strict compliance with applicable Air Force regulations, should involve all stages of administrative

processing entailed therein, and should be conducted so as to insure plaintiff her full rights in said processings and a fair adjudication of her complaint," with Mrs. Clemente and her attorney to be present at all stages of the administrative processing. (Appendix B, page 156.)

From this April 30, 1980 remand judgment, the Air Force appealed, again contesting the jurisdiction of the district court. On December 14, 1981, the United States Court of Appeals for the Ninth Circuit issued its Memorandum dismissing the government's appeal for "lack of jurisdiction to review the merits of the appeal" and remanded the case to the district court where "all of appellee's claims will be considered," (Emphasis added, Appendix B, page 148.)

D. INTERIM "ADMINISTRATIVE PROCESSING"

At the same time it was appealing, the Air Force began "administratively processing" Mrs. Clemente's complaints. However, the processing was done in violation of the district court's Remand Judgment and applicable Air Force regulations and considered only one of petitioner's four complaints, in spite of meetings, telephone discussions, numerous letters, and continual urgings by petitioner's attorney. The Air Force and its officials never disagreed with petitioner's attorney's position that combined administrative processing of all four complaints was required and never requested any clarification of the district court; Assistant U.S. Attorney, Peter Osinoff, even represented to the district court that administrative processing of all complaints would indeed occur.

Initially, upon the district court's remand, petitioner's attorney forwarded a copy of the Remand Judgment and requested an outline of processing steps, copies of applicable regulations, answers to interrogatories, and the production of documents, to all of which no response was ever received.

Air Force investigator Johnstone was eventually assigned to the case. Petitioner and her attorney met with defendant Johnstone and presented an outline of the complaints, proof thereon, and expectations for full administrative processing. However, defendant Johnstone advised that without the petitioner's participation, he would only investigate the discrimination complaint, that the district court had only remanded the discrimination complaint, and that he would not expand the scope of his investigation to the other three complaints, all over

petitioner's firm protest.

Petitioner's attorney then arranged for a meeting with defendant Brower, one of Vandenberg's Legal Officers and defendant Seneschal, Vandenberg's CPO, and demanded full administrative processing of all claims and the production of documents. After initially agreeing with petitioner's positions, defendant Brower later informed petitioner's attorney that neither the Air Force, the FEAA nor the Merit Systems Protection Board ("MSPB") would provide any processing. Defendant Brower's advisements were made on the same day that defendant Pray, Vandenberg's Personnel Officer, issued a "Notice of Proposed Disposition of Discrimination Complaint" proposing cancellation of petitioner's discrimination complaint upon the finding that "race was not a factor" in the RIF action.

Over the many months of the course of defendant Johnstone's investigation, petitioner's counsel wrote to defendants Brower, Johnstone, and Seneschal explaining that none of Clemente's witnesses had received interrogatories or been contacted, interrogatories for Air Force witnesses had not been sent to petitioner's counsel for review prior to sending as agreed, that requests for documents were outstanding, and that interrogatories had not been answered. These processing deficiencies were never remedied.

Upon receipt of defendant Pray's notice of proposed cancellation of petitioner's discrimination complaint, petitioner's attorney wrote to defendant Pray setting forth the numerous deficiencies in the Air Force's "administrative processing", again requesting combined adjudication of all four complaints. A

letter --- copies of which went to defendant Brower and Assistant U.S. Attorney Osinoff --- cited pertinent Air Force regulations, cautioned that constitutional due process rights of petitioner were being violated, and attached copies of Owen v. City of Independence, Missouri, 445 U.S 622 (1980), the district court's Remand Judgment, and a full memorandum of points and authorities. At the same time, another letter was sent directly to Assistant U.S. Attorney Osinoff indicating that the Air Force was violating Judge Hauk's orders, that they were refusing to diligently, promptly and completely process Mrs. Clemente's claims and that such acts were violative of the principles of Owen v. City of Independence, Missouri, supra, thereby perfecting liability of the Air Force and individual government officials to petitioner for damages.

Defendant Bishop, Vandenberg's Base Commander, several weeks later, issued a Notice of Final Decision (Appendix B, pages 170-174) indicating that the Air Force had appropriately focused its investigation, although it "acted and continues to act, under compulsion of court order" in its "good faith" attempt to comply with the district court's Remand Judgment.

E. SECOND COMPLAINT AND TRIAL

With the initial appeal still pending and the Air Force having rendered its Final Decision (Appendix B, pages 170-174), petitioner Clemente reopened the proceedings in district court on December 24, 1980, and amended her initial complaint to include due process claims against the United States, United States Air Force, and the individual defendants herein named. The due process claims were predicated upon the Air Force's post 1980 refusal to

process three of petitioner's four claims, the refusal to follow Air Force regulations and the district court's orders, and the perfunctory processing of the discrimination complaint.

In May-June, 1983, after dismissal of the initial appeal, and numerous government motions, a court trial occurred. Petitioner's claims of retaliation and denial of constitutional due process rights were upheld; the claim of racial discrimination was denied because of insufficient evidence; and other claims were left unresolved as relief therefor was subsumed in the relief awarded. Remedies granted for the Title VII retaliation included back pay, seniority promotion to a GS-12, Step 4 position with training, and attorney's fees. For the constitutional due process violations, the court awarded compensatory and punitive damages and attorney's fees.

F. SECOND APPEAL

Through a second appeal by all defendants, the Ninth Circuit Court of Appeals, on July 24, 1985, determined that they were bound by the precedent of sovereign immunity, and thus, the damages against the United States and United States Air Force were reversed; that petitioner Clemente had neither a protectable property nor a protectable liberty interest in her civil service position or career, and thus, damages against the individual defendants must fail; and that the district court applied the wrong legal standard in adjudicating retaliation damages. The judgment of the district court was thus reversed and the case remanded for further proceedings in the district court.

## REASONS FOR GRANTING A WRIT

A. Overview.

Like its treatment of A. Ernest Fitzgerald, the Air Force has used a one-person "Reduction-In-Force" to rid one of its organizations of an unwanted individual. 6/ Since 1977, Lowene Clemente has demanded a name-clearing hearing. The Air Force, even after a district court order, has deliberately and obstinately refused to follow its own regulations -- particularly, paragraph 33, AFR 40-713. (Exhibit "D", page 177.) Thus, appropriate evaluations, investigations, hearings, and remedies have not occurred.

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6/ Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972); Hampton v. Fitzgerald, 409 U.S. 1100 (1973); Fitzgerald v. Seamans, 553 F.2d 220 (D.C. Cir. 1977); Fitzgerald v. Staats, 578 F.2d 435 (D.C. Cir. 1978); Nixon v. Fitzgerald, 457 U.S. 731 (1982); Harlow v. Fitzgerald 457 U.S. 800 (1982).

How is a district court to deal with such a recalcitrant governmental agency? By injunction, remand, reversal of the personnel action and contempt -- the Ninth Circuit Court of Appeals has stated its decision -- but not through a Bivens damages remedy. Injunction and remand were already used in this case without success. A Bivens damages remedy against responsible governmental entities and officials is necessary; otherwise due process rights of federal civil servants and the judicial power to enforce them are meaningless. There is no remedy for years of deliberate obstinance -- 8 years in this case; and federal agencies can deliberately flaunt the authority of the federal courts with impunity and without concern for the serious consequences of their actions.

1. Contrary to the District of Columbia Circuit's opinion in Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972), the

Ninth Circuit herein determined that there are no liberty or property interests, protectable under the Fifth Amendment, in a civil service position and career; and thus, no Bivens damages may be awarded against responsible government officials in spite of their knowing, deliberate and obstinate refusal to follow Air Force regulations and district court orders. Certiorari should be granted so that this conflict is resolved and the property and liberty interests of federal civil servants are established with district court enforcement through a Bivens damages remedy.

2. Had Mrs. Clemente been a municipal employee, she would have had a damages remedy under 42 USC section 1983. Owen v. City of Independence, Missouri, supra, 445 U.S 622 (1980). Bivens actions are analogized to those under 42 USC section 1983; Bivens and the 1983 cases are used interchangeably by this Court; and

Butz v. Economou, 438 U.S. 478 (1978) states that it is improper to draw distinctions between cases involving state and federal actions brought for constitutional violations, otherwise, the constitutional design is stood "on its head". Thus, the common law doctrine of sovereign immunity should be defeated when a federal constitutional violation exists so that a remedy is provided and the judiciary retains its authority to enforce due process and other civil liberties. Marbury v. Madison, 1 Cranch 137 (1803).

B. Certiorari Should Be Granted To Resolve Conflicts Among Circuits And Determine That Federal Civil Service Positions And Careers Are Property And Liberty Interests Protected Under The Fifth Amendment Of The Constitution

AFR 40-713 states that all the claims of an appellant are to be adjudicated in a combined proceeding with appropriate procedural safeguards. (Appendix D, page 178.) The district court, in its

Remand Decision and Judgment in April, 1980, found that the Air Force failed to properly process Mrs. Clemente's "complaints" and warned that such failure constituted an "arbitrary, capricious, and an unreasonable denial of due process of law rights of the plaintiff." Appendix B, page 153.) In remanding the case for administrative processing, the district court ordered that the "processing should be accomplished in strict compliance with applicable Air Force regulations, should involve all stages of administrative processing entailed therein and should be conducted so as to insure plaintiff her full rights in said proceedings and a fair adjudication of her complaints." (Appendix B, page 156.)

Through subsequent court proceedings and continual communication by petitioner's attorney, the Air Force and each of the individual defendants, each of which

was responsible, in some part, for the administrative processing, were made personally aware of the requirements of AFR 40-713 and the district court's Remand Judgment. Yet, the Air Force and each of the individual defendants deliberately, continuously and obstinately refused to provide appropriate administrative processing or follow AFR 40-713 and the Remand Judgment, even after subsequent directives by the district court.

For these deliberate violations, the district court, relying on Fitzgerald v. Hampton, supra, determined that Clemente had a property interest in her GS-07 position and a liberty interest in her civil service career protectable under the Fifth Amendment and thereby awarded Bivens damages. The Ninth Circuit, without mentioning or distinguishing Fitzgerald v. Hampton, supra, in its opinion, determined that Mrs. Clemente did not have a protected

liberty or property interest and thus Bivens damages were inappropriate.

The right to hold specific employment and to follow a chosen career free of unreasonable governmental interference come within the liberty and property concepts of the Fifth Amendment, "property" consisting of employment itself and "liberty" being the freedom of a career. Dent v. West Virginia, 129 U.S. 114 (1889). In Fitzgerald v. Hampton, supra, the District of Columbia Court of Appeals, in relying upon dicta and differentiation in Greene v. McElroy, 360 U.S. 474 (1959) and Vitarelli v. Seaton, 359 U.S. 535 (1959) found that Fitzgerald was within the paramaters of the civil service regulations, as he was a "preferenced eligible employee"; and thus, "the statutory employment rights of Fitzgerald (were) within the liberty and property concepts of the Fifth Amendment."

467 F.2d at 762. Why else the elaborate system of adjudicating federal civil service grievances and appeals through the Federal Employee Appeals Authority , the Merit Systems Protection Board and the alternate EEO systems? Footnote 15 of Nixon v. Fitzgerald, supra, albeit dicta, is this Court's indication of agreement with the Fitzgerald v. Hampton analysis. Based thereon and Horne v. Merit Ststems Protection Board, 684 F.2d 155 (D.C. Cir. 1982), the district court herein awarded petitioner Clemente Bivens damages against the purposely deliberate and obstinate individual defendants.

The Ninth Circuit's opinion initially admits that Bivens claims may not be precluded by Title VII if they are not predicated on the same factual basis, Nolan v. Cleland, 686 F.2d 806 (9th Cir. 1982); but then concludes, to the exact contrary, that civil service remedies preclude Bivens

claims based upon different factual basis, citing Bush v. Lucas, 462 U.S. 367 (1983). Bush v. Lucas, supra, is factually distinguishable, as Bush attempted to gain Bivens and civil service remedies based upon the exact same conduct, whereas Clemente's administrative claims arise from the 1977 actions of the 6596th Instrumentation Squadron and her Bivens claims arise from the post-1980 acts of the named individual defendants -- they are not based on the same factual predicate. Thus, since there are no demonstrated special factors counselling hesitation and no adequate, alternative remedies that are equally effective, Clemente, as a victim of a constitutional violation, had a "right to recover damages". Carlson v. Green, 446 U.S. 14 (1980).

For the thousands of federal civil servants throughout our country, clarification should be provided that they

indeed possess property and liberty interests protectable under the Fifth Amendment of the Constitution of the United States; and certiorari should be granted herein.

C. Certiorari Should Be Granted To Insure That There Is A Damages Remedy For All Federal Constitutional Violations, Irrespective Of The Common Law Doctrine Of Soverign Immunity

There exists a conflict in the remedies available to a victim of a constitutional violation, dependent upon whether the perpetrator is a federal agency or lower governmental entity. Compare Owen v. City of Independence, Missouri, 445 U.S. 622 (1980) with the remedies of Mrs. Clemente herein.

Although this Court has stated that:

> "Victims of a constitutional violation . . . have a right to recover damages. Carlson v. Green, supra, 100 S. Ct. at 1472.

"The very essence of civil liberty certainly consists of the right of every individual to claim protection of the laws, whenever he receives a injury." Marbury v. Madison, supra, 1 Cranch at 163.

" . . . where federally protected rights have been invaded, it has been the rule that courts will be alerted to adjust their remedies so as to grant the necessary relief.

And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong

done. Bell v. Hood, 327 U.S. 678, 684 (1946) and

> "A damage's remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and . . . the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." Owen, supra, 445 U.S. at 649.

Petitioner Clemente, a victim of a constitutional violation by a federal agency, would be treated differently if the offending entity were a lower governmental entity, all because of the common law doctrine of sovereign immunity.

Mrs. Clemente's plight is no different than that of George Owen, as reported in Owen v. City of Independence, Missouri, supra. Owen, like Clemente, was advised that:

> "There is no appellate procedure or forum provided by the Charter or ordinance of the City of Independence, Missouri, relating to the dismissal of Mr. Owen."

This Court in Owen, however, noted:

> "Doctrines of tort law have changed significantly over the past century and our notions of governmental responsibility should probably reflect that evolution. No longer is individual 'blameworthiness' the acid test of liability; the principles of equitable loss- spreading has joined fault as a factor in

distributing the cost of official misconduct." 445 U.S. at 657.

Owen, supra, with the underpinings of Monell v. Department of Social Services, City of New York, 436 U.S. 658 (1978) held that governmental agencies, to constitutionally support the deprivation of employment rights, must be able to provide a system for the fair and proper adjudication of grievances and appeals and that governmental entities are liable in damages for violations of constitutional rights, thereby shunning the historical concepts and defenses of sovereign immunity, need for explicit sovereign immunity waivers, and restrictions upon the expenditure of public treasury funds --- concluding that proper remedies for constitutional violations and "equitable loss-spreading" are paramount interests. In summary, the court stated:

"We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principles in the scenario of the 1983 cause of action: the victim of a constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, as long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal responsibility for damages that are more

> appropriately chargeable to the populous as a whole. And the public will be forced to bear only the cost of injury inflicted upon the 'execution of a government's policy or custom, whether made by its law makers or those whose edicts and acts may fairly be said to represent official policy.'" 445 U.S. at

These principles are equally applicable herein and should be extended to the federal government, which has a greater capability to absorb damages. The doctrine of sovereign immunity should give way to allow recovery for constitutional violations. Otherwise, the constitutional design is indeed stood "on its head" and an illogical distinction in damages is drawn on whether the perpetrator is a federal agency or lesser governmental agency and whether the action is based upon 42 U.S.C.

section 1983 or the Fifth Amendment, contrary to Dutz v. Economu, 438 U.S. 478, 504 (1978).

The common law doctrine of sovereign immunity should give way to the supreme law of our country, the Constitution of the United States. The doctrine is mistaken, unjust and is not historically well founded, as "in Great Britain, the King himself is sued in a respectful form of a petition and he never fails to comply with the judgment of his court." Marbury v. Madison, supra, 1 Cranch at 138. See also Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, (1970) 68 Michigan Law Review 387; 3 Davis, Administrative Law Treatise, Chapter 27 (1958 Supp. 1965); Byse, Proposed Reforms in Federal "Non statutory" Judicial Review", Sovereign Immunity,

Indispensible Parties, Mandamus (1962) 75 Harvard Law Review 1479; Carrow, Sovereign Immunity in Administrative Law -- A New Diagnosis (1960) 9 J. Pub. L. 1; Borchard, Governmental Liability in Tort, 34 Yale Law Journal 1 (1924); Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Columbia Law Review 1889 (1983); and Justice Traynor's decision in Muskopf v. Corning Hospital District, 55 Cal.2d 211 (1961).

Owen, supra, changed the law in 44 states and the District of Columbia. Justice Powell's dissent, Owen v. City of Independence, Missouri, supra; and there is no reason why a federal agency, who perpetrates a constitutional violation, should be entitled to an automatic exemption for damages. In summary,

> "Nothing in the Bivens opinion limits the doctrine to a case in which federal employees are

> defendants. The theory of the opinion is broad enough to produce the same result if . . . the defendant is the United States or a local government . . . . The Supreme Court should . . . make clear that any violator of the Constitution is liable for damages in a suit directly under the Constitution." 3 Davis, Administrative Law Treatise, section 27:26 at 147 and 154.

Otherwise,

> "How 'uniquely amiss' it would be, therefore, if the government itself -- 'the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct' --

be permitted to disavow liability for the injury it has begotten."

Owen, supra, 445 U.S. at 651.

Certiorari should be granted so that all victims of constitutional violations are afforded appropriate remedies.

## CONCLUSION

Wherefore, petitioner Lowene R. Clemente prays that a writ of certiorari be granted so that the liberty and property interests of federal civil servants are clarified and that all victims of constitutional violations are afforded appropriate remedies.

Dated: October 7, 1985

Respectfully submitted,

HATCH AND PARENT

S. TIMOTHY BUYNAK, JR.

By_____
S. TIMOTHY BUYNAK, JR.

## CERTIFICATE OF SERVICE BY MAIL

I, S. Timothy Buynak, Jr., a member of the Bar of the Supreme Court of the United States and counsel of record for Lowene R. Clemente, petitioner herein, hereby certify that on October 11, 1985, pursuant to Rule 33, Rules of the Supreme Court, I served three (3) copies of the foregoing Petition For Writ Of Certiorari on each of the parties herein by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Santa Barbara, California, addresed as follows:

Solicitor General
Department of Justice,
Washington, D.C. 20530

Edward R. Cohen
United States Department of Justice
Room 3127
9th and Penn N.W.
Washington, D.C. 20530

All parties required to be served have been served.

Dated: October 11, 1985

S. TIMOTHY BUYNAK, JR.

S. Timothy Buynak, Jr.

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